STATE OF MICHIGAN

IN THE SUPREME COURT

_____

IN THE MATTER OF
NSA MCCARTHY, MINOR
_____/

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

-vs-

TRACY REED,

Respondent-Appellant.

_____/

Supreme Court
No. 151039

Court of Appeals
No. 318855

Oakland County Circuit Court
Family Division
No. 2007-739244-NA

PETITIONER-APPELLEE'S BRIEF IN OPPOSITION TO RESPONDENT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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RESPONSE TO RESPONDENT-APPELLANT'S JURISDICTIONAL STATEMENT

This case arises from an Opinion and Order signed by the Honorable Mary Ellen Brennan of the Oakland Circuit Court's Family Division on August 29, 2013, terminating Respondent's parental rights toward the minor child. The Court of Appeals affirmed in a unanimous unpublished per curiam opinion issued on January 15, 2015. Respondent filed her application on February 12, 2015.

On March 26, 2015, this Court entered an order scheduling this matter for argument on the application and directing the parties to file briefs on the issue of best interests, as follows:

> On order of the Court, the application for leave to appeal the January 15, 2015 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument, for the morning session on May 5, 2015, on whether to grant the application or take other action. MCR 7.302(H)(1). The parties and the lawyer-guardian ad litem (LGAL) shall file briefs no later than April 17, 2015, addressing whether termination of parental rights was in the best interests of the child. In particular, the parties and the LGAL shall address the effect given to the child's age, her expressed desire for her mother to retain parental rights, and the LGAL's concurrence that parental rights should not be terminated. See MCL 722.23(i). The parties should not submit mere restatements of their application papers. [*In re McCarthy*, __Mich__ (2015).]

This Honorable Court has jurisdiction in this matter pursuant to MCL 600.215 and MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTION PRESENTED

I. **All children require and deserve the permanence, stability, and finality that are lacking when there is continuing uncertainty after a parent shows an inability to be, or a lack of interest in being, a parent. Termination of Respondent's parental rights is in NM's best interests in order to remove the uncertainty that clouds NM's future due to Respondent's continuing unwillingness, or inability, to show that she is a capable parent or that she can provide an appropriate home for NM. NM and Respondent no longer share a parent-child relationship. The family court correctly considered both NM's desires to remain in an unsupervised, rule-free atmosphere and the LGAL's recommendation that NM be allowed to continue lingering in care while waiting for Respondent to correct her parenting deficiencies on her own. Did the family court clearly err in concluding that it was in NM's best interests to terminate Respondent's parental rights in order to provide NM with the permanence and structure that she requires?**

The Court of Appeals answered, "no."

Petitioner answers, "no."

Respondent answers, "yes."

The lawyer-guardian ad litem answers, "yes."

The family court terminated Respondent's parental rights.

COUNTER-STATEMENT OF FACTS

This case is the culmination of numerous family court proceedings involving Respondent Tracy Reed and her children that were first initiated fifteen years ago, in 2000. After this lengthy family court involvement that attempted to help Respondent correct the parenting deficiencies that resulted in the previous termination of her rights to her three other children, on August 29, 2013, the Honorable Mary Ellen Brennan of the Oakland Circuit Court terminated Respondent's parental rights toward N.S.A. McCarthy (NM) [d/o/b June 2, 1999].[1] In the earlier proceedings involving NM and her siblings JN, KR, and RR, Respondent failed to comply with a Parent Agency Agreement (PAA) and fled to Georgia with NM and RR (who were eventually returned to Michigan by DHS personnel). The family court terminated Respondent's parental rights to JN, KR, and RR in January 2012, but concluded that termination was not in NM's best interests *at that time*. The Court of Appeals affirmed in January 2013, and this Court denied leave to appeal. *In re Nabers/Reed*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 10, 2013 (Docket No. 308818),[2] lv den 493 Mich 945 (2013).

The family court again made extensive efforts to reunify NM and Respondent. However, after Respondent's failure to comply with her new PAA showed once again her unwillingness (or inability) to assume the serious responsibilities involved in parenting NM, the court directed Petitioner to file a supplemental petition seeking termination of Respondent's parental rights in December 2012. Respondent's parental rights to NM were ultimately terminated in August 2013. She filed an untimely claim of appeal that the Court of Appeals treated as an application and denied. This Court remanded as on leave granted. *In re McCarthy*, 495 Mich 959 (2014). The Court of Appeals ultimately affirmed. *In re McCarthy (After Remand)*, unpublished opinion per

[1] A copy of the family court's Opinion and Order is attached as Appendix A.
[2] A copy of the opinion is attached as Appendix B.

curiam of the Court of Appeals, issued Jan. 15, 2015 (Docket No. 318855).[3] Respondent again sought leave to appeal before this Court. On March 26, 2015, the Court set this matter for argument on the application and directed the parties and lawyer-guardian ad litem (LGAL) to file briefs on the issue of best interests. *In re McCarthy*, __Mich__ (2015).

A. Summary of history of the case up to the first terminations.[4]

Respondent's children were made temporary court wards in both 2000 and 2007. In January 2008, Respondent was convicted of Child Abuse (Third Degree) against JN. Less than a month after the family court ended its jurisdiction in February 2009, Respondent and JN engaged in a violent physical altercation over a cell phone. Petitioner again sought temporary jurisdiction over JN. The petition was later amended to include Respondent's other children, KR, NM, and RR, based on Respondent's inability to manage JN's behavior. A jury found that the family court had jurisdiction over the children. Respondent was given a PAA that required her to address her parenting deficiencies with parenting classes and counseling.

KR, NM, and RR initially remained with Respondent while the family court attempted various unsuccessful placements for JN. Respondent allowed KR to live with his grandfather, unbeknownst to the family court or Petitioner. Respondent's relationship with Petitioner grew increasingly contentious. In July or August 2010, Respondent fled to Georgia with NM and RR, leaving KR behind. Despite the pending case, Respondent left the state without permission from either the court or Petitioner. NM and RR were eventually returned to Michigan with the help of the Georgia authorities, and NM was placed in foster care. Respondent made only minimal efforts to visit the children thereafter.

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[3] A copy of the opinion is attached as Appendix D.

[4] This summary is drawn from the family court's January 17, 2012 opinion and order terminating Respondent's parental rights to JN, KR, and RR (attached as Appendix C) and from the Court of Appeals' January 2013 opinion affirming the family court's opinion and order. [Appendix B.]

Moreover, Respondent never provided any required documents to show that she complied with the PAA and never learned how to react appropriately to a child's rebellious behavior. She continued to lack insight into her own behavior and was unable to admit that her problems with JN could foreshadow similar issues with KR, NM, and RR as they aged. Petitioner sought termination of Respondent's parental rights to all four children under MCL 712A.19b(3)(c)(*i*), (3)(g), and (3)(j). The family court concluded that each of these grounds existed, but then only terminated Respondent's parental rights to JN, KR, and RR, based on her behavior toward JN and her unwillingness to provide the permanent, stable environment that the children needed. However, the court concluded that termination was not in NM's best interests because NM did not have an available family placement and was more bonded with Respondent than her siblings.

B. Further proceedings regarding NM – January 2012 through October 2012

The family court held several permanency planning and review hearings regarding NM after terminating Respondent's parental rights to JN, KR, and RR. Respondent participated in all of them by phone. On January 24, 2012, Petitioner recommended a goal of reunification if Respondent complied with a new PAA, a goal with which the court agreed at that time. (PP-I, 3, 10–13.)[5] Respondent remained in Georgia. (PP-I, 7–8.) The record indicated that NM was having difficulty in school and was exhibiting behavioral issues in her foster home. (PP-I, 9–10, 16.)

A new PAA was created by March 5, 2012, and it included various requirements for Respondent to show her dedication to reunification and her willingness and ability to provide a proper parenting environment for this teenaged child, such as: **1)** maintain contact with the case workers at least twice monthly by phone or e-mail; **2)** continued therapy with a licensed

[5] PP-I = Permanency Planning Hearing, Jan. 24, 2012; R-I = Review Hearing I, March 5, 2012; R-II = Review Hearing II, June 11, 2012; R-III = Review Hearing III, July 30, 2012; PP-II = Permanency Planning Hearing II, Oct. 29, 2012; P = Pretrial Hearing, Dec. 21, 2012.

therapist; **3)** verified parenting classes; **4)** a schedule of any type of contact with NM; and **5)** contact with NM's therapist. (R-I, 3–4, 10–12.) Respondent would also have to **6)** provide documentation verifying her housing and income. (R-I, 12.) The court reminded Respondent (who planned to remain in Georgia) of her obligation to provide documentation. (R-I, 9.)

Three months later, on June 11, 2012, reunification was no closer because Respondent failed to provide necessary, requested documents that included her proof of income, and the court ordered that "whatever tax forms are available be faxed within three business days." (R-II, 3–4, 7–8, 10.) The case worker was also unable to verify that Respondent took parenting classes. (R-II, 12–13.) The court noted that it had already explained to Respondent the difficulty she faced by remaining in Georgia while NM was in care in Michigan and again ordered that Respondent must provide any remaining documents within three days. (R-II, 13–21.) The court stressed that it would not continue NM's current unstable environment by "bounc[ing]" NM from one foster home to another and that "the window is now" for any chance at reunification, to which Respondent replied, "Okay." (R-II, 21–25.) The LGAL[6] provided an update on NM, who wanted more counseling and had a list of concerns that the LGAL said showed the "turmoil" and "uncertainty" she was experiencing.[7] (R-II, 25–28.)

Over a month later, on July 30, 2012, the case worker had received only some documents from Respondent—including a few immediately before the hearing. (R-III, 3–7.) The court allowed Respondent to continue with her therapist, despite Petitioner's concerns with the therapist's qualifications. (R-III, 7–8.) The case worker was concerned that Respondent was not benefiting from services and would not be able to provide a safe home for NM. (R-III, 9.) She

[6] Attorney Stephen Raimi (P19195) has been the LGAL since this case began.
[7] NM, who had just turned 13, was concerned about when she might be "going home" or who she might live with other than a foster parent. (R-II, 25.)

noted that Respondent still directly blamed JN for everything instead of taking responsibility for the consequences of her own decisions. (R-III, 8–9.) The worker also noted that Respondent had visited NM only *twice* in the past *seven months*. (R-III, 10.) Respondent claimed that she had visited Michigan more than that and that she could try to visit once a month. (T-III, 10–12.)

The worker noted that if Respondent continued working with her counselor, then NM's permanency plan had the potential to change to something other than termination. (R-III, 13.) Petitioner asked to continue assessing guardianship options. (R-III, 13.) The court was comfortable with possible reunification if progress was made and if Respondent's home was appropriate for NM's needs. (R-III, 14–15.) The court had a "sincere hope" for reunification, but wanted **1)** completed, verified parenting classes, **2)** a home study in Georgia, **3)** "two face to face visits" between NM and Respondent for as many days as possible, and **4)** ongoing phone contact and therapy. (R-III, 21–22.) Finally, the worker also noted that NM became "very upset" due to Respondent saying "negative and not necessarily accurate things" about the court and DHS, though Respondent's attorney replied that NM called Respondent after DHS told her that it was Respondent's fault that she had not gone home. (R-III, 28–29.) The court urged NM, who was present, to discuss her frustrations with her therapist or the LGAL. (R-III, 29–32.)

As of October 29, 2012, Respondent had not made any verified visits with NM since July. (PP-II, 4–6.) On one occasion, NM claimed to her foster parent that Respondent was in Michigan, but then said that Respondent was unable to talk when the foster parent called and asked to talk to her. (PP-II, 4–6.) NM's grandfather later said that Respondent was not allowed in his home, where NM was at the time of the alleged visit. (PP-II, 4–6.) This was the only information that the worker had about any alleged visit since the July hearing when the court ordered Respondent to have at least two face-to-face visits with NM. (PP-II, 6.) The worker had

also learned that Respondent stopped going to therapy in September and that the Georgia agency denied a home study after Respondent failed to provide requested documents. (PP-II, 6–7.)

Respondent claimed that when she visited NM, she "never spoke to anybody . . . I never talked to any of the workers ever" and, despite her familiarity with the family court process, that she did not know that it "was as serious as this[.]" (PP-II, 17–18.) She admitted not going to counseling because she claimed that "it was done[.]" (PP-II, 18–19.) Respondent claimed that her counselor said that she did not have to go back because counseling for this case "had finished." (PP-II, 19–20.) The court corrected Respondent by noting that it had allowed her to continue using that counselor "because there are clearly still issues." (PP-II, 19.)

The family court explained that its prior hope was that considering options other than the termination of Respondent's rights to NM "would motivate" her to "[a]t least substantially comply" with the PAA, but it did not see the necessary progress. (PP-II, 20–21.) The LGAL noted that NM still wanted to be with Respondent, but recognized that it was troubling that Respondent once again did not comply with the PAA and that there had been no verified visits with NM since the July court hearing. (PP-II, 22–23.) He noted that Respondent had indicated out of court that she might move back to Michigan, but only temporarily. (PP-II, 23–24.)

Ultimately, the family court concluded that "[i]t's more of the same in the court's mind." (PP-II, 26–28.) The court noted that NM was beginning to exhibit behavioral issues and that Respondent's rights to the other children were previously terminated due to her non-compliance with her PAA. (PP-II, 29.) The court felt that NM had "lingered in this placement and – and **I feel somewhat responsible in light of the fact that I did not terminate parental rights when there were proofs offered that may have supported it.**" (PP-II, 32 (emphasis added).) As a result, the court permitted the filing of a supplemental petition. (PP-II, 32–34.)

C. Pretrial Hearing and Bench Trial – December 2012 through March 2013

A pretrial hearing was held on December 21, 2012. (P, 3.) Respondent, who participated by phone, gave the court a new address in Belleville, Michigan, so that she could be sent a copy of the new petition. (P, 5–6.) The court set the date for a bench trial and granted one hour per week of supervised visitation—if Respondent in fact now lived in Michigan. (P, 6–13, 15.)

A bench trial was held on March 14, 2013. (T, 3.)[8] Lori Lambertsen was a Foster Care Case Manager at the Ennis Center, author of the petition, and NM's foster care worker since August 2012. (T, 5–7, 16.) NM came under the court's jurisdiction after physical abuse allegations involving NM's older sister and Respondent, which led to an open protective services case. (T, 7–8.) Respondent fled from Michigan to Georgia with NM and her sister while the case was pending. (T, 8.) This was "why the children came into care." (T, 8.)

Respondent signed a new PAA in March 2012 that required her "to maintain emotional stability, demonstrate appropriate parenting skills, including engage in appropriate visitation with [NM]. [She] was to provide proof of adequate housing and proof of legal and adequate income." (T, 8.) However, Respondent failed to comply with the PAA. Respondent found a counselor in Georgia, but she ended counseling *of her own volition* without any explanation—and without the approval of the family court or Petitioner—in September 2012. (T, 8–9, 27, 48–49.) Her counseling was supposed to continue until reunification with NM. (T, 9–10.)

Respondent also failed to adequately visit with NM, as required by the PAA. (T, 10–11, 63.) Respondent only visited NM two or three times from March to July 2012, and there was no proof of any visits at all after July 30, 2012, when the family court ordered Respondent to have at least two face-to-face visits with NM. (R-III, 22; T, 10, 39, 45, 63.) There was a possible, but

[8] T = Bench Trial, March 14, 2013.

nonetheless unverified, visit on October 12. (T, 11, 39, 63.) Ms. Lambertsen had requested verification of the visit, which Respondent was unable to provide. (T, 11–12, 39.) NM's foster parent had also tried to verify the visit, which supposedly occurred at NM's grandfather's house, by phone. (T, 11.) NM answered the phone, though, and said that Respondent was in the bathroom and then that she was out with friends. (T, 11.) NM's grandfather later contradicted this assertion by noting that Respondent was not allowed in his home at all at the time. (T, 11.) Ms. Lambertsen was not satisfied that the visit had actually happened. (T, 43–44.)

Respondent also failed to establish that she had a verified source of income or appropriate housing. (T, 12–13, 34–36, 65, 70–71.) Her last income verification document was an unsigned 2011 tax return. (T, 12–13, 34–35, 65, 70–71.) The continuing lack of verification was discussed with Respondent at an October 2012 Family Team Meeting, but after that meeting Respondent never provided any additional verification documents such as tax forms or bank statements. (T, 13, 37–38.) There was no verification of income for all of 2012. (T, 37–38, 65.) Likewise, a request for a home study by Georgia's DHS agency was "denied . . . due to non-compliance" by Respondent. (T, 12, 19, 25, 67.) According to the Georgia agency, Respondent "was not cooperative," and the study was denied because she did not provide requested documents. (T, 12, 30, 67.) Rather than attempting to restart the home study process in Georgia, Respondent had indicated at some point that she would just move back to Michigan. (T, 29–30, 34.)

Ms. Lambertsen had no contact with Respondent after January 9, 2013. (T, 13–14.) In December 2012, the court had allowed for supervised visits if Respondent had in fact moved back to Michigan and if her home was assessed and deemed appropriate. (T, 14.) On January 9, Respondent said that she was in New York and would contact the agency when she returned. (T,

14.) Ms. Lambertsen sent a reminder letter to the address in the court's file in February, but she received no response. (T, 14–15.) The letter was never returned. (T, 14–15.)

Based on Respondent's failure to provide proof of adequate housing and to visit NM "to establish that bond," Ms. Lambertsen felt that she had not made any progress.[9] (T, 15.) It was difficult to keep in touch with Respondent. (T, 15.) Ms. Lambertsen recommended termination because NM had been in care for over two years and deserved "permanency," which Respondent showed that she could not provide, rather than the "limbo" she had been in for years. (T, 16.) Ms. Lambertsen also felt that Respondent had not met NM's emotional needs. (T, 64–65.)

Respondent testified after Petitioner rested. (T, 77, 79.) She claimed she had spoken to a woman named Natasha Springer from the Georgia agency about a home assessment. (T, 80.) She also spoke to Ms. Springer about her "situation" with parenting classes and got a referral to a new location for the classes, which she completed. (T, 80–83.) Respondent claimed that she worked as a hair stylist for cash and debit cards, and that she was now allegedly a "partner" in an existing Georgia business. (T, 83–84.) Business was "kind of slow" because she had been out of town a lot, and some stylists left. (T, 84–85.) Respondent admitted that she was supposed to provide income verification. (T, 85–86.) She claimed to recall sending tax records to Ms. Johnson [her prior case worker] and giving proof of income to Georgia officials for a home study. (T, 86–87.) Respondent claimed that Michigan DHS never asked for anything else after she provided her 2011 tax return, and she had not filed for 2012 yet. (T, 129–131.)

Respondent knew that therapy was part of her PAA, and she saw a therapist for "about a year." (T, 87–88.) Respondent stopped going because she had classes on the only day her therapist held sessions and because she felt like "my counseling was complete." (T, 88–89.)

[9] The only aspect of the PAA that Respondent complied with was to find and take an approved online parenting class in June 2012. (T, 10, 27, 48.)

Respondent acknowledged that she had to have a home study done. (T, 89.) The Georgia agency contacted her based on Michigan DHS's referral. (B, 89–90.) She claimed that she received a letter from Ms. Springer around June 19, 2012, telling her that she was being considered for placement. (T, 91, 98.) Respondent alleged that the letter said that the request was sent in as a relative placement and provided a list of things to do, such as providing income verification and having her doctor return a physical paper, among others. (T, 91–96.) She also claimed to have sent copies of her driver's license, auto insurance, and lease. (T, 96–97.)

Respondent claimed that Ms. Springer said that her application would be automatically denied if she had any felonies or was on the Central Registry, based on how the referral was sent. (T, 98–99.) She testified that Ms. Springer said that she could have an independent evaluation, which she did. (T, 99, 101–103.) She also claimed that she received a letter in July 2012 that stated a medical letter from her doctor was missing, so she called her doctor's office to have them send it. (T, 105–106.) Later, she received another letter from the Georgia agency saying that her case was closed because the medical report was missing. (T, 106–107.) She did not recall any of the dates. (T, 106–107.) She testified that Ms. Springer told her that the file was never considered because it was incomplete. (T, 107.) Respondent acknowledged that Petitioner had introduced as evidence a document that said that the home study was denied because she did not cooperate.[10] (T, 105.)

Respondent also knew the court's visitation expectations. (T, 112.) She admitted that she had visited to Michigan *five* times since September 2012 and claimed that she visited NM *once* in September and *once* in October. (T, 117–121.) However, she could not provide the dates and alleged that one of these visits occurred at her father's house. (T, 112–114.) She admitted that

[10] Petitioner's Exhibit #1 was a packet of letters from the Georgia agency that denied the placement, indicating that Respondent was not cooperative. (T, 77–79.)

she was "able to" have more than the two court-ordered visits. (T, 117.) Respondent said she talked to NM "every day" and sent her money and a debit card. (T, 115–116.)

Respondent testified that before the Family Team Meeting in October 2012, she thought that NM would be returned. (T, 109, 124.) Respondent claimed that the team discussed the home assessment with her, but not visitation. (T, 131–132.) Respondent "[didn't] know what happened" when she learned that Petitioner would file for termination. (T, 109, 124.) She felt her home was appropriate, that she could provide proper care for NM, and that she had done all that was asked of her. (T, 111–112, 116.)

Respondent did not remember when she last spoke to Ms. Lambertsen. (T, 124–125.) Throughout the case, Respondent had "never talked to the foster care workers or the DHS workers unless it was about the [PAA]," and she said that "I didn't really think that I had to – honestly as long as the stuff that was done on paper that needed to be done that's all I really actually thought that I needed to talk to them about." (T, 126–128.) She alleged that she was told not to worry about moving back to Michigan, but claimed that she would in order to get NM back and that she could work in her brother's nightclub. (T, 128–129.) She alleged that she had in fact already started moving her belongings and that she would take over her brother's house when he moved in June, at which time her lease in Georgia would end. (T, 135–140, 143–144.)

The attorneys then gave closing arguments. (T, 145–153.) In its ruling, the court adopted the LGAL's arguments, which focused on the lack of proof that Respondent had a suitable home or income, as well as the lack of visitation and cooperation by Respondent. (T, 151–154.) Any minimal improvement that Respondent made was "not nearly significant enough to convince the court that she can provide proper care and custody for this child." (T, 154–155.) The court found that Respondent lacked an appropriate level of stability, that Respondent's testimony about

moving back to Michigan was "**[n]ot credible at all**," and that Respondent had no intention to prioritize NM. (T, 155 (emphasis added).) The court noted that the Georgia reports showed "the same verbiage that has been argued from the prosecutor's side of the table since the beginning of the case. It's non-compliance, [Respondent] not cooperative." (T, 155–156.) While the case began due to issues with NM's older sister and "a lot of people have put a lot of effort in," the court found that Respondent was not one of them because she repeatedly showed the court that **"[e]verything else is a priority" over NM.** (T, 156–157 (emphasis added).) Noting that NM had "waited long enough for some level of permanency," the court concluded that statutory grounds for termination existed. (T, 153, 157–159.)

D. Best-Interest Hearing – May 1, July 15, & July 30, 2013

Respondent was referred for a psychological evaluation. (B-I, 7.) Notice was sent to the address that Respondent had provided to the court, but she failed to appear for her evaluation. (B-I, 8–9.)[11] The family court denied her request for a new referral on the first day of the best-interest hearing, citing the "voluminous testimony" in the case showing her repeated failures to follow through with appointments and paperwork. (B-I, 9–10.) [The court reconsidered its ruling before the second best-interest hearing date. (*See* B-II, 36–37).]

Respondent called a witness out of order, her counselor Grace Anderson. (B-I, 13.) Ms. Anderson was Respondent's counselor "off and on for a full year," though she had not spoken to Respondent since Respondent decided to end her counseling "several months" earlier. (B-I, 13 – 14, 20, 24–25, 28.) Respondent told Ms. Anderson that she stopped attending counseling due to her employment, because of other things the court required her to do, and because, she claimed, she "felt like she was okay[.]" (B-I, 14–15, 20–22, 26.) While Ms. Anderson felt that Respondent

[11] B-I = Best Interests Hearing, Vol. I, May 1, 2013; B-II = Best Interests Hearing, Vol. II, July 15, 2013; B-III = Best Interests Hearing, Vol. III, July 30, 2013.

had an adequate support system in Georgia based on Respondent's representations, she believed that continued counseling or mentoring would have been beneficial to Respondent and that Respondent should resume counseling if all of her children came to live with her. (B-I, 18–19, 22.) Respondent had not disclosed, and Ms. Anderson was not aware until this hearing, that Respondent's parental rights to three of her children had been terminated. (B-I, 28–29.)

Petitioner called Ms. Lambertsen. (B-II, 3–5.) Ms. Lambertsen explained that NM came into foster care in the current case in November 2010, following allegations of physical abuse by Respondent toward NM's older sister, JN, when she was around NM's current age of 14. (B-II, 5–6.) When Ms. Lambertsen took over the case, the goal was to attempt reunification with Respondent. (B-II, 9–10.) The court and agency attempted to be flexible to reach this goal and accepted some of the service providers that Respondent chose in Georgia, including the Biblical counselor Respondent saw for almost a year before she ended counseling on her own. (B-II, 21–23, 30.) The agency's goal changed when the home study in Georgia was denied due to Respondent's non-cooperation. (B-II, 10–11, 15, 18.) An independent home study was not accepted by the agencies in either Georgia or Michigan. (B-II, 13–14.) Respondent "reported" that personnel from Georgia told her that her request for the study would not be accepted because she had a felony and that her doctor had not sent some requested papers. (B-II, 14.) Respondent never said that a home study occurred but that she failed. (B-II, 27–28.)

Ms. Lambertsen felt that termination of parental rights was in NM's best interests based on her length of time in care and her lack of a relationship with Respondent. (B-II, 7, 17.) NM required a structured environment and stability, which Respondent failed to provide and had not shown that she could provide. (B-II, 7–8, 18, 24–25, 31–32.) NM spoke to Respondent often, but was "very vague" about their conversations, which Respondent often cut short. (B-II, 23, 27.)

Petitioner did not know anything about Respondent's current home or her current income because Respondent did not communicate with the agency. (B-II, 7, 18, 28–29, 31–32.) NM's age played a role in the termination request because she was "very impressionable" and had "difficulty accepting . . . responsibility" for her actions. (B-II, 7–8.) She had "been living in limbo[,]" not knowing if she would return to Respondent. (B-II, 8, 24, 28.) Ms. Lambertsen felt that this instability had negatively affected NM and believed that Respondent and NM only had a "friendship bond" rather than a parent-child relationship. (B-II, 8–9, 26–27.)

Petitioner next called Dr. Douglas Park, who evaluated Respondent and NM to aid in the best-interest determination. (B-II, 36–37, 46.) Before doing these evaluations, he reviewed the petition and his prior evaluations of both Respondent and NM. (B-II, 37.) He had previously recommended termination of Respondent's parental rights to NM in 2011 based on the facts and circumstances presented at that time. (B-II, 38.)

At the current evaluation, Respondent appeared tired and questioned the need for the evaluation. (B-II, 38.) She rushed through a questionnaire and left many answers blank, which was "usually a sign of carelessness." (B-II, 38, 49, 52.) She never said she was too tired to do the test. (B-II, 52–53.) Her profile showed "fixed content, false responding," which indicated "a poor attitude towards the testing" and made it invalid. (B-II, 38–39, 49–51.) This concerned Dr. Park given the seriousness of the matter. (B-II, 39.) He and Respondent discussed the petition's allegations and why her children first came into care. (B-II, 39–40.) Respondent's description of NM as not needing much discipline did not match reports from her foster mother or school, who indicated that NM "argues a lot, is impulsive, [and has] difficulty following rules." (B-II, 40, 47–48, 55–58.) Although NM was becoming an adolescent, Respondent did not think that she would need much discipline. (B-II, 40–41, 47.) Given the behavioral "track" of NM's siblings, Dr. Park

believed that it would be difficult for Respondent to parent NM. (B-II, 41.) Respondent felt bonded to NM. (B-II, 41.) However, while NM felt she could talk to Respondent, the only thing that she could really "identify about [Respondent]" when Dr. Park asked was that Respondent "would provide transportation to her and her friends." (B-II, 41, 46.) Her inability to identify any positive attributes of Respondent as a parent was particularly concerning. (B-II, 41.)

Ultimately, Dr. Park noted that Respondent had not "really been in a parental role for quite some time now" and that he did not believe she could provide proper care for NM. (B-II, 41.) Respondent's relationship with NM was more of a friendship. (B-II, 42.) She had not made any progress since her last evaluation and was actually "more defensive." (B-II, 42.) She still maintained that none of her children should have been removed from her care in the first place, showing a lack of insight as to why they came into care. (B-II, 42–43, 59.) Respondent did not have a concrete plan on how to deal with NM any differently than she had with JN. (B-II, 57–58, 60–62.) Dr. Park believed that it was in NM's best interests to terminate Respondent's parental rights. (B-II, 42.)

Petitioner offered no further witnesses, and the psychological reports were admitted without objection. (B-II, 64.) Respondent called NM, who thought that she was in court for something to do with JN. (B-II, 65–68.) NM had lived with a foster mother since November 2010, which was "[s]tressful" because she "want[ed] to go home" to Respondent. (B-II, 69, 77, 85.) Since coming back from Georgia, where she described her life as having been "[g]ood," NM claimed that she saw Respondent about "once a month." (B-II, 71, 77.) She last saw Respondent in the fall of 2012. (B-II, 70–71.) They spoke "[a]lmost every day" by phone or video chat and talked about "[w]hatever is going on or bothering [NM]." (B-II, 69–70, 72–73, 77, 81–82.) NM claimed that Respondent sometimes sent her money. (B-II, 74–76.)

NM was "[s]ad" when she found out that she would not go back with Respondent. (B-II, 79.) She claimed that a counselor and a case worker said bad things about Respondent, and the worker threw Respondent "under the bus." (B-II, 80–81.) NM stated that she believed that Respondent would discipline her "[v]erbally" rather than hitting her if they lived together. (B-II, 83.) She and Respondent never talked about whether Respondent would change things, but she testified that she wanted to live with Respondent. (B-II, 83–84, 88.)

Respondent testified and admitted that she had some failings in this case, but continued to attempt to blame others by claiming that they had failings as well. (B-II, 90–92.) She claimed that she did "[e]verything" she could to get NM back in 2012, including going to counseling and taking parenting classes. (B-II, 93.) She alleged that she provided requested documents through her attorney. (B-II, 93.) Respondent testified that she thought that NM would be returned after a home study. (B-II, 94–95, 116.) She again claimed that she did everything that she was supposed to do, but worried that she would not be approved unless DHS made a change to the home study referral. (B-II, 95–96.) Respondent alleged that the study eventually came back, but she claimed that she was "never told" why it was denied. (B-II, 96.) She alleged, though, that it was because she had a felony and was on the Central Registry list. (B-II, 97.)

Respondent also claimed to have a stable home in a two bedroom apartment and that she could provide for NM. (B-II, 97–98.) Respondent still did not understand "this whole case" and asserted that DHS had lied to her, broken promises to her, and that *they* were hurting NM. (B-II, 98.) She claimed that "I'm not going to [do] nothing to hurt my daughter. They know I love my daughter, but because of y'all hate to me [sic] so much because y'all been bullying me and badgering me and you know everything about this case is nothing but hatred to me." (B-II, 98–99, 121.) She testified that she felt that she had done everything she could to maintain a

relationship with NM, such as allegedly giving her money and 'disciplining' her by phone. (B-II, 99–100.) Respondent claimed that she could provide a safe home and proper discipline for NM by approaching any problems with NM differently than in the past. (B-II, 102–105, 111–112.)

Respondent admitted that she last saw her counselor in September 2012, although she promised that she would resume counseling if NM was returned. (B-II, 107–108.) Their home would be in Georgia, if the court was not involved. (B-II, 109–110.) Respondent also claimed that, before the court stopped visitation, she "always" set up visits with NM through her father. (B-II, 110.) Respondent alleged that these visits were not "verified" only because she never called the case workers or NM's foster mother to do so. (B-II, 114.) She stopped contacting the workers because of the petition to terminate her parental rights. (B-II, 110–111.)

The best-interest hearing ended on July 30, 2013. (B-III, 3.) Petitioner argued that Respondent's parental rights should be terminated to give NM the permanence she needs. (B-III, 4–8, 23.) Respondent's counsel argued that NM should be placed with Respondent. (B-III, 8–17.) The LGAL acknowledged that Respondent was not ready to care for NM based on her lack of compliance, but suggested a possible guardianship for NM with her foster mother. (B-III, 17–23.) This would continue until Respondent could prove that it should end. (B-III, 22–23.) He noted, though, that there were family members who indicated they might take NM if Respondent was not involved. (B-III, 22.)

E. Opinion and Order on Best Interests – Aug. 29, 2013

On August 29, 2013, the court issued a written Opinion and Order terminating Respondent's parental rights. [Appendix A.] After outlining the case's extensive history and taking judicial notice of the social and legal files, including the psychological evaluations, the family court made the following pertinent findings based on the best-interest hearing testimony:

- NM had been in foster care since November 19, 2010. This case arose after Respondent was alleged to have physically abused NM's older sister, JN.

- Respondent ended her [court-ordered] counseling in fall of 2012, telling her counselor, Grace Anderson, that she had too many hardships and was too busy trying to satisfy all of the court's requirements.

- NM's foster care worker, Lori Lambertsen, had no evidence of where Respondent lived or what her income was.

- Respondent was not involved with NM's therapy. Respondent often cut her conversations with NM short because she was busy and could not talk. They spoke, on average, three times per week; NM was very vague about what they talked about when Ms. Lambertsen asked her.

- Ms. Lambertsen felt that NM and Respondent no longer had a true parent-child relationship and only interacted as if they were peers.

- Respondent cannot parent or meet NM's needs. NM required structure and stability, which Respondent failed to provide.

- Respondent had an opportunity to move back to Michigan from Georgia and have a home study conducted, but she never followed through.

- NM was exhibiting behavioral issues, and Ms. Lambertsen believed that NM would be better off if Respondent's parental rights were terminated because she would not be "living in limbo" anymore.

- Dr. Douglas Park found that Respondent's description of NM as never having problems or getting into trouble did not match the description provided by NM's foster mother or her school.

- Respondent had a "poor attitude" towards psychological testing, "which rendered it useless."

- The only positive attribute of Respondent that NM could identify when she was asked about Respondent was that, if they were reunified, Respondent could provide vehicle transportation for NM and her friends.

- Respondent showed no insight into her problems or into why her parental rights to her other children were terminated. She continued to deny any responsibility for the loss of her children.

- Dr. Park felt that Respondent could not meet NM's basic or emotional needs, and she had no plan to deal with NM differently than her other children. Her parenting abilities had not improved.

- NM found it stressful living with her foster mother because she wanted to live with Respondent, whom she spoke to "5-6 times a week" by phone or Skype. They talked about "what is going on and school issues."

- NM had not seen Respondent since fall of 2012. She "wants to go home because life with her mom 'was good.'" She felt sad when Respondent did not follow through on her responsibilities.

- Respondent testified that she wants to fight for NM and acknowledged failings by herself, but still maintained that other people involved in the case had failings as well.

- She claimed she complied with everything that was asked of her and thought that NM was going to be returned. She believed that DHS lied to her, broke promises, made her children suffer, bullied her, hated her, and badgered her.

- Respondent believed that she could provide a safe environment for NM, whom she believes is different from JN.

- Respondent claimed to have a permanent home in Georgia and that she last saw NM in October 2012. She never contacted DHS to see NM and could not remember if she could have supervised visits in January 2013 and do a home study at her brother's Michigan home. Respondent alleged that she completed everything necessary to have NM returned to her. [Appendix A, at 1–8.]

Rejecting Respondent's claims that she did everything that was asked of her, the court concluded that "the record indicates that that is *not* true" and that, contrary to Respondent's contentions, "there is no evidence that she completed everything or that she has in the past or *will in the future* follow the rules or requirements with regard to [NM]." [*Id.* at 8–9 (emphasis original).] The court also addressed the LGAL's recommendation, noting that he stated that **NM loves Respondent and wants to be with her, which is "relevant."** [*Id.* at 9 (emphasis added).] However, the LGAL was concerned by Respondent's actions and relied on testimony by Ms. Lambertsen and Dr. Park regarding NM's needs and Respondent's lack of progress. [*Id.*] The court noted that the LGAL also felt that Respondent had not changed much, was concerned that she had no plan for housing, and did not provide requested information. [*Id.*]

Ultimately, the family court concluded that despite the LGAL's recommendation of a guardianship with NM's foster mother, and in light of all of the evidence presented on best interests, a preponderance of the evidence supported a conclusion that termination was in NM's best interests. [*Id.* at 9–10.] The court believed that a guardianship would be "just another temporary solution" for NM that would not give the necessary permanence. [*Id.* at 10.] The court also relied on its own evaluation of Respondent's conduct and her testimony throughout these proceedings, which showed that her priorities were "anything but" NM, who had been in care for well over two years. [*Id.*] Respondent was given many opportunities for reunification, but did not comply. [*Id.*] The court noted that Respondent originally left Michigan without permission and never returned, and it was still not clear where she lived. [*Id.*] The court concluded that Respondent did in fact want to fight, but unfortunately her fight was against the system and not to regain custody of NM. [*Id.*] The court therefore ordered the termination of her parental rights. [*Id.* at 10–11.]

Respondent appealed as outlined previously, and the Court of Appeals ultimately affirmed after a further remand to the family court. *In re McCarthy (After Remand)*, unpub op at 1–2. Respondent sought leave to appeal before this Court, and on March 26, 2015 the Court set the matter for argument on Respondent's application and ordered briefing on the issue of best interests. *In re McCarthy*, __ Mich at __. Additional pertinent facts may be discussed in the body of this brief's Argument section to more fully advise this Honorable Court as to the issues raised.

ARGUMENT

I. **All children require and deserve the permanence, stability, and finality that are lacking when there is continuing uncertainty after a parent shows an inability to be, or a lack of interest in being, a parent. Termination of Respondent's parental rights is in NM's best interests in order to remove the uncertainty that clouds NM's future due to Respondent's continuing unwillingness, or inability, to show that she is a capable parent or that she can provide an appropriate home for NM. NM and Respondent no longer share a parent-child relationship. The family court correctly considered both NM's desires to remain in an unsupervised, rule-free atmosphere and the LGAL's recommendation that NM be allowed to continue lingering in care while waiting for Respondent to correct her parenting deficiencies on her own, but it did not clearly err when it concluded that it was in NM's best interests to terminate Respondent's parental rights in order to provide NM with the permanence and structure that she requires.**

Standard of Review & Issue Preservation:

A family court's decision to terminate parental rights is reviewed for clear error. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); MCR 3.977(K). A decision is clearly erroneous when it strikes the reviewing court as "'more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish.'" *People v Cheatham*, 453 Mich 1, 30 n 23; 551 NW2d 355 (1996), quoting *Parts & Electric Motors, Inc v Sterling Electric, Inc*, 866 F2d 228, 233 (CA 7, 1988). The reviewing court should be left with "a definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989), quoting *In re Riffe*, 147 Mich App 658, 671; 382 NW2d 842 (1985) (internal quotation marks omitted). *See also In re Engle*, 480 Mich 931 (2007) (reinstating the Oakland Circuit Court, Family Division's opinion and order terminating the respondent's parental rights after the Court of Appeals "misapplied the clear error standard by substituting its judgment for that of the trial court."). This Court gives deference to a trial court's findings of fact in light of the trial court's superior ability to judge the credibility of the witnesses before it and to weigh the evidence before it. *In re Miller*, 433 Mich at 337; MCR 2.613(C).

Petitioner acknowledges that this issue may be raised for the first time on appeal.

Discussion:

In an order dated March 26, 2015, this Court directed the Clerk to schedule oral argument on whether to grant Respondent's application for leave to appeal or take other action. *In re McCarthy*, __Mich at __. The Court further ordered that:

> The parties and the lawyer-guardian ad litem (LGAL) shall file briefs no later than April 17, 2015, addressing whether termination of parental rights was in the best interests of the child. In particular, the parties and the LGAL shall address the effect given to the child's age, her expressed desire for her mother to retain parental rights, and the LGAL's concurrence that parental rights should not be terminated. See MCL 722.23(i). The parties should not submit mere restatements of their application papers. [*Id.*]

Petitioner now files its brief as directed by this Court's March 26, 2015 order.

A. Summary of Petitioner's argument.

The family court did not clearly err when it considered many factors and concluded that termination of Respondent's parental rights was in NM's best interests. NM requires permanence, stability, and finality, but those essential conditions are entirely absent from her life due to continuing uncertainty as to whether she will ever be placed with Respondent. In this case, Respondent again failed to meet the requirements of her new PAA, showing her continuing inability to parent NM. Specifically, Respondent ended her counseling without permission, failed to provide any income verification for 2012, and failed to make *any* verified visits with NM after July 2012. NM and Respondent no longer had a true parent-child relationship. It is Petitioner's position that Respondent's unwillingness (or inability) to take these minimal actions clearly shows that Respondent lacks the responsibility and proper parenting skills to meet NM's needs.

The family court was aware of NM's desire to immediately return to Respondent's care and of the LGAL's recommendation that NM be placed in a guardianship while Respondent was given yet another chance to show that she could properly care for NM. It is not surprising that

NM continues to be attached to Respondent, because Respondent is NM's mother. Nor is it surprising that the now-teenaged NM wishes to live in the minimally supervised environment that Respondent would provide. However, the court correctly recognized this factor was outweighed by the entire, and quite lengthy, record of both Respondent's parenting problems and Respondent's consistent and repeated failure to put effort into complying with the tasks that the court imposed to ensure that Respondent's parenting skills and home life were suitable and appropriate for NM. Absent termination of Respondent's parental rights, uncertainty as to whether NM could ever return to Respondent's care would continue to cloud NM's future, regardless of her desires or her placement. The family court did not clearly err when it concluded that termination of Respondent's parental rights was in NM's best interests. This Court should deny the application or affirm the family court and Court of Appeals.

B. Legal standards in child protective proceedings and the best-interest analysis.

Although it is the policy of this state to keep a child with his or her natural parents whenever possible, child protective proceedings are meant *to protect the child*. MCL 712A.1(3); *In re Brock*, 442 Mich 101, 107; 499 NW2d 752 (1993). The juvenile code is intended to protect children from unfit homes, not to punish their parents. *In re Brock*, 442 Mich at 108, citing *In re Jacobs*, 433 Mich 24, 41; 444 NW2d 789 (1989). "'If a parent cannot or will not meet her irreducible minimum parental responsibilities, the needs of the child must prevail over the needs of the parent.'" *In re Terry*, 240 Mich App 14, 28; 610 NW2d 563 (2000), quoting *In re AP*, 728 A2d 375, 379 (Pa Super Ct, 1999). In order to terminate parental rights, a trial court must first find that at least one statutory ground for termination has been shown by clear and convincing evidence. *In re Sours*, 459 Mich at 632, 641; MCL 712A.19b(3). A parent's liberty interest no longer includes the right to custody and control of the child once Petitioner has clearly and

convincingly shown that there is at least one ground for termination, but instead gives way to the state's interest in protecting the child. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000).

In Michigan, MCL 712A.19b(5) governs the termination of parental rights after a court finds at least one statutory basis for the termination of those rights. The statute states that:

> (5) If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made. [MCL 712A.19b(5).]

A family court must find that the termination is in the child's best interest by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). That is, the court must conclude, based on the record before it, that it is "more likely than not" that termination of a respondent parent's parental rights is in the child's best interests.[12] *See Holloway v General Motors Corp*, 399 Mich 617, 636–637; 250 NW2d 736 (1977) (explaining that a preponderance of probability is "more likely than not"). *See also* M Civ JI 8.01. Child protective cases are considered one continuous proceeding, and thus the court is expected to consider all previously-admitted reports and exhibits. *In re King*, 186 Mich App 458, 465; 465 NW2d 1 (1990).

The Michigan Legislature has not confined a family court's best-interest analysis in a termination of parental rights case to a set of particular factors, MCL 712A.19b(5), unlike some of our sister states. *E.g.*, *In re Tajannah O*, 8 NE3d 1258, 1265–1266 (Ill Ct App, 2014) (noting

[12] Until MCL 712A.19b(5) was amended by 2008 PA 199, it required a trial court to "terminate parental rights unless it [found] by *clear evidence* that termination [was] not in the child's best interests." *In re Moss*, 301 Mich App at 83, citing *In re Trejo*, 462 Mich at 354 (emphasis added). After the statute was amended to its present form, though, the Court of Appeals determined that the preponderance of the evidence standard could be constitutionally applied at the best-interest phase. *Id.* at 84–90. In reaching this conclusion, the *Moss* Court explained that by the time a best-interest analysis occurred, 1) the parent has already been found to be unfit by clear and convincing evidence, 2) the child's interest in a "normal family home" is superior to any interest that the parent retains, and 3) the use of a heightened standard would increase the burden on the state and impair the state's interest in preserving and promoting the child's welfare. *Id.* at 86–90.

that the best-interest analysis in a termination case is guided by statutory factors, though there is no need for explicit reference to any factor and no requirement as to how the factors are weighed); *In re Darryl T-H*, 234 Wis 2d 606, 616–617, 620; 610 NW2d 475 (Wis, 2000) (noting that Wis Stat 48.426(3) provides a non-exhaustive list of factors that a trial court must consider in its best-interest analysis without assigning specific weight to any factor). Accordingly, the Court of Appeals has held that a family court may consider a variety of factors when making its best-interest analysis, including: the respondent's past history, psychological evaluations, parenting techniques during parenting time, domestic violence, the child's age, visitation and meaningful contact, family bond, participation in the treatment plan and counseling, and the foster environment and potential for adoption. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009); *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001). The child's need for permanence, stability, and finality is also a pertinent consideration. *In re Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012).

Additionally, both this Court and the Court of Appeals have recognized that the best-interest factors found in the Child Custody Act ("CCA"), MCL 722.23, *may* be considered in a court's best-interest analysis in a termination case. *In re Barlow*, 404 Mich 216, 235–236; 273 NW2d 35 (1978); *In re JS & SM*, 231 Mich App 92, 102–103; 585 NW2d 326 (1998), overruled in part on other grounds by *In re Trejo*, 462 Mich at 353. These factors include:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23[13].]

A court is under no obligation to use any of the CCA factors in a best-interest analysis in a termination case, *In re JS & SM*, 231 Mich App at 102–103, because those factors tend to be more relevant when comparing potential placements. *In re COH*, 495 Mich 184, 205; 848 NW2d 107 (2014). In termination cases, no such comparison is usually possible because placement with the parent is highly unlikely; after all, when a court makes a best-interest analysis in such cases, it has just recently concluded that there are statutory grounds to terminate parental rights entirely. MCL 712A.19b(3); MCL 712A.19b(5). However, the court retains the discretion to use the CCA factors in its analysis if it so desires. *In re JS & SM*, 231 Mich App at 102–103.

[13] When a court considers these factors in the context of a child custody case, they need not be given equal weight. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

C. The family court considered numerous factors in its best-interest analysis, including NM's wishes, the LGAL's recommendation, Respondent's history and inability to properly parent NM, the lack of a true parent-child relationship, and NM's need for permanence, stability, and finality. After weighing these factors, the court correctly concluded that termination was in NM's best interests.

At the March 14, 2013 bench trial, the family court concluded by clear and convincing evidence that at least one statutory ground existed for the termination of Respondent's parental rights. *In re Sours*, 459 Mich at 632, 641. Following the best-interest hearing, the court issued a written Opinion and Order [Appendix A] in which it concluded that termination of Respondent's parental rights was in NM's best interests. The court considered numerous factors in its best-interest analysis and properly exercised its discretion in weighing each factor. *In re Miller*, 433 Mich at 337. In light of the entire history of this case and all of the record evidence, the court's conclusion that Respondent's parental rights should be terminated was not clearly erroneous. *Id.*

1. NM's age and her desire to immediately return to Respondent's care.

Among the factors that the family court noted and considered in its best-interest ruling were NM's age and her desire to immediately return to Respondent's care. As previously discussed, a child's age is among the factors that a family court may consider when making a best-interest determination. *In re Jones*, 286 Mich App at 131; *In re AH*, 245 Mich App at 89. Likewise, the "*reasonable* preference of the child, if the court considers the child to be of sufficient age to express preference" is among the factors listed in the CCA. MCL 722.23(i) (emphasis added). Some states explicitly require that a child's wishes must be taken into account when a court makes its best-interest ruling in a termination of parental rights case.[14] Other states

[14] *E.g.*, *In re Tajannah O*, 8 NE3d at 1265–1266 (explaining that in a termination case, the best-interest determination is guided in part by statutory factors that include the child's wishes); *In re CF*, 862 NE2d 816, 825–826 (Ohio, 2007) (explaining that when a court makes a best-interest determination it is guided in part by five statutory factors that include the child's wishes); *In re Darryl T-H*, 234 Wis 2d at 616–617, 620 (noting that Wis Stat 48.426(3) lists various factors that

list statutory factors that must or may be considered, but the child's preference is not among them.[15] A few states, through case law, mandate that certain factors that may or may not include the child's wishes be considered.[16] Finally, still others allow for the consideration of the child's preference without requiring it.[17] Michigan is among the latter states. MCL 712A.19b(5). Any consideration of the child's preference remains discretionary in Michigan. *In re Barlow*, 404 Mich at 235–236; *In re JS & SM*, 231 Mich App at 102–103.

The family court in this case was well aware of and gave consideration to both NM's age and her desire to immediately return to Respondent's care. Both Ms. Lambertsen and NM herself testified that NM was 14 at the time of the best-interest hearing. (B-II, 6, 67.) The family court's Opinion and Order reflects a finding, based on Ms. Lambertsen's testimony, that NM was at a "delicate age" and had been in care for over two and a half years. [Appendix A, at 5.] The court noted NM's date of birth in the Opinion and Order as well. [*Id.* at 1.] Moreover, the court was in any event well aware of NM's age, having presided over this case for a substantial amount of time and having taken judicial notice of the case files and psychological evaluations.[18] [*Id.* at 3.] Likewise, NM repeatedly expressed her desire to "go home" with Respondent during her

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a trial court must consider in making its best-interest determination in a termination of parental rights case, including the child's wishes).

[15] *E.g.*, *Shirley M v State*, 342 P3d 1233 (Alas, 2015) (noting that a best-interest determination in a termination of parental rights case is guided in part by a non-exhaustive list of statutory factors, which does not include the child's wishes).

[16] *E.g.*, *Shepherd v Clemons*, 752 A2d 533, 538 (Del, 2000) (noting that a trial court's best interests determination in a termination of parental rights case is guided in part by factors listed in the state's child custody statute, which includes the child's wishes);

[17] *E.g.*, *Jefferson v Ark Dep't of Human Servs*, 356 Ark 647, 659–660; 158 SW3d 129 (2004) (noting that the child's wishes may be considered as a factor in the decision to terminate parental rights); *State ex rel TMP*, 126 So 3d 741, 761 (La, 2013) (noting that a child's wishes may be considered in the best-interest analysis, but the weight given to this factor is within the court's discretion).

[18] A court can take "judicial notice of its own files and records." *Jones*, 286 Mich App at 129.

testimony at the best-interest hearing.[19] (B-II, 59, 77, 84–85, 88.) The family court was well aware of NM's desire to return to Respondent's care. [Appendix A, at 7, 9.]

The family court properly declined to give any significant weight to either NM's age or her desires. [Appendix A.] Petitioner can find no authority in support of the proposition that the child's age and wishes, when considered either mandatorily or discretionarily in a child protective proceeding, must be given greater weight than either the state's interest in protecting the child or any other factor(s). *In re Brock*, 442 Mich at 107 ("The purpose of child protective proceedings is the protection of the child[.]"). *A child's wishes, regardless of age, are not necessarily consistent with or determinative of his or her best interests.*[20] The courts of this state

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[19] NM had also expressed this desire at the time of the first best-interest hearing when Respondent's parental rights to JN, KR, and RR were terminated. (*See* Transcript 12/12/2011, at 63, 73.)

[20] The proceedings prior to the termination of Respondent's parental rights to JN, KR, and RR plainly show that a child may minimize, recant, or even attempt to take blame for a parent's behavior. During the adjudicatory trial on February 4 and 5, 2010, the family court allowed Petitioner to treat JN as a hostile witness and ask leading questions. (Transcript 02/04/2010, at 198.) Among other things, JN blamed herself for Respondent's behavior and wanted to return to Respondent's home. (*E.g.*, Transcript, 02/05/2010, at 41–44.) The United States Supreme Court has noted that the notion that children and their decision making processes are different rests both on "common sense—on what 'any parent knows'" and "on science and social science as well." *Miller v Alabama*, __US__; 132 S Ct 2455, 2464; 183 L Ed 2d 407 (2012), quoting *Roper v Simmons*, 543 US 551, 569; 125 S Ct 1183; 161 L Ed 2d 1 (2005). The Court explained that there are significant gaps between children and adults:

> First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from *their family* and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's[.]" [*Miller*, 132 S Ct at 2464, quoting *Roper*, 543 US at 569–570 (internal citations omitted, emphasis added).]

See also People v Carp, 496 Mich 440, 531 n 16; 852 NW2d 801 (2014) (KELLY, J, dissenting) (exploring further the differences between adult and juvenile minds and briefly discussing one of the studies cited by the United States Supreme Court in *Miller*).

have recognized that even the adult victims of extreme abuse perpetrated by their family members may nonetheless choose to remain with their abuser or minimize the abusive behavior for any number of reasons. *See, e.g.*, *In re Dearmon/Harverson-Dearmon*, 303 Mich App 684, 700; 847 NW2d 514 (2014) (holding that the termination of respondent's parental rights was in the children's best interests when, in part, the respondent made only "halfhearted efforts" to leave her abusive boyfriend even when it was the boyfriend's perpetration of domestic violence that brought the family to the attention of CPS); *People v Wilson*, 194 Mich App 599, 602–605; 487 NW2d 822 (1992) (discussing the specifics of battered spouse syndrome and the admissibility of evidence about it). Thus, it should not be surprising that a child—especially one whose parent may be neglectful, not abusive—would consistently express a desire to return to that parent instead of remaining in foster care.

While a family court should undoubtedly be cognizant of a child's desires,[21] they must be evaluated in the context of the entire record if they are considered in a best-interest analysis. Last term, this Court held that because MCL 712A.19c(2) does not direct a trial court to apply certain factors or otherwise limit the court's discretion when determining whether it is in a child's best interests to appoint a guardian, "the statute grants the court discretion regarding how to determine what is in the child's best interests depending on the case-specific circumstances." *In re COH*, 495 Mich at 201–202. This reasoning applies with equal force to a best-interest determination under MCL 712A.19b(5), which also does not direct the courts to apply certain factors or otherwise limit their discretion in a best-interest analysis. This consideration is in fact reflected in the CCA (if the court chooses to refer to the CCA, *In re JS & SM*, 231 Mich App at

[21] In Michigan, the LGAL must communicate the child's position to the court, including in those instances in which the LGAL's determination of what is in the child's best interests conflicts with the child's view. MCL 712A.17d.

102–103), which directs the court to consider a child's "*reasonable* preference" when it finds the child to be of "sufficient age to express preference." MCL 722.23(i) (emphasis added).

Despite NM's age and her preference to immediately return to Respondent's care—not simply that Respondent's parental rights continue—all of the evidence in this case showed that her preference was unreasonable. *See* MCL 722.23(i). *See also In the Interest of KC*, 903 A2d 12, 15 (Pa Super Ct, 2006) (explaining that while a dependent child's wishes are an important factor in a best-interest analysis, they must be based on "good reasons," with maturity and intelligence taken into account and the ultimate weight given to the wishes left to the court's determination). NM could not identify any positive attributes of Respondent other than that she could provide transportation to NM and her friends. (B-II, 41, 46.) NM and Respondent only related as if they were peers, not parent and child. (B-II, 8–9, 26–27, 42.) Respondent had no concrete plan to address any difficulties she might have with NM in a different way than she dealt with JN. (B-II, 57–58, 60–62.) Moreover, there was no indication that Respondent could even provide a proper home: Petitioner had no idea where Respondent lived or what her income was at the time of the best-interest hearing.[22] (B-II, 7, 18, 31–32.) It was not clear error for the family court to consider, but give minimal weight to, NM's age or her desire to return to an unfit home. *In re Miller*, 433 Mich at 337.

2. The LGAL's recommendation to place NM in a guardianship and allow Respondent a third opportunity to prove she could care for NM.

The family court also properly considered and rejected the LGAL's recommendation that NM be placed in a guardianship with her foster mother rather than terminating Respondent's parental rights. [Appendix A, at 9–10.] Placement in a guardianship is one option available to a

[22] The earlier proceedings also showed a history of allegations that Respondent tried to coach NM not to cooperate with DHS. (*See* Transcript 01/10/2011, at 13–14.)

family court when termination of a parent's parental rights is clearly not in the child's best interests. MCL 712A.19a(7). A court may choose to pursue a guardianship in certain cases, such as when the court "concludes that the [child] should not be returned to respondent but an ongoing relationship with him [or her]—rather than termination—is in the [child's] best interests." *In re Mason*, 486 Mich 142, 168–169; 782 NW2d 747 (2010).

In this case, both NM's wishes and the LGAL's recommendation presumed that Respondent's parental rights would not be terminated. Unlike NM, though, the LGAL recognized that Respondent had not proven that she could parent or that it would be safe for NM to be returned to her care. (B-III, 17–22.) Instead, the LGAL proposed that NM be placed in a guardianship with her foster mother, because he believed that it would give NM stability while termination would leave her in a "state of flux and uncertainty." (B-III, 22–23.) He argued that this would allow Respondent a chance to "get her things together and come in with a package of proofs to the guardianship judge and ask to terminate the guardianship." (B-III, 22.) The LGAL noted, though, that there might be relatives who would be willing to take NM into their care—but only if Respondent was no longer able to assert her rights and opinions.[23] (B-III, 22.)

The family court correctly concluded that a guardianship as suggested by the LGAL would be just another temporary solution that would deprive NM of any sense of permanence, stability, or finality. [Appendix A, at 10.] Petitioner agrees. It is the LGAL's recommendation, rather than the termination of Respondent's parental rights, that would leave NM in a continued state of flux and uncertainty. *In re Olive/Metts*, 297 Mich App at 42 (noting that the child's need

[23] While there is no preference for the creation of a guardianship with a relative after the termination of parental rights, *see In re COH*, 495 Mich at 200, the evidence clearly showed that NM was unhappy in foster care. (B-II, 69.) A more permanent placement with her own relatives thus might have been preferable to foster care from NM's point of view if she could not return to Respondent's home. However, such a placement was seemingly possible only if Respondent's parental rights were terminated. (B-III, 22.)

for permanence, stability, and finality is a pertinent consideration in a best-interest analysis). The LGAL's recommendation left open the possibility that Respondent might someday be able to petition to have the guardianship ended. *See In re TK*, 306 Mich App 698, 705; 859 NW2d 208 (2014) (explaining that certain entities or individuals, including a parent, may petition the court to terminate a guardianship). If the court adopted the recommendation, NM would continue living in foster care, tantalized by the prospect that she *might* be able to return to Respondent's care *if* Respondent finally showed that she could properly parent and provide for NM. In view of Respondent's history as seen over the course of years in this case, that prospect would be illusory at best. NM had already been disappointed at least once when she thought that she would be able to return to Respondent's home, only to find that Respondent had failed to fulfill her obligations. (B-II, 78–79.) There was evidence that this instability had affected NM negatively. (B-II, 8.)

Quite simply, the LGAL's recommendation offered little in the way of permanence, stability, and finality for NM. *In re Olive/Metts*, 297 Mich App at 42. Instead, as Respondent's consistent, repeated failures to comply with the reunification requirements have proven, the LGAL's recommendation promised only the dim, improbable hope of a reunion and a high probability of continued disappointment for NM. If the court did not terminate Respondent's parental rights and instead placed NM as recommended by the LGAL, then its jurisdiction under MCL 712A.2(b) would end. MCL 712A.19a(10). Yet, Respondent already had consistently and repeatedly shown that she could not properly parent NM or provide an appropriate home even while NM *was* under the court's jurisdiction. NM's foster care worker could not even tell where Respondent lived or what her income was due to Respondent's ongoing lack of communication. (B-II, 7, 18, 31–32.) Not only had Respondent ended her court-ordered counseling on her own because she "felt like she was okay[,]" but when her counselor testified at the best-interest

hearing it was revealed that Respondent never truthfully disclosed the extent of her parenting problems and that her parental rights to her other three children had been terminated. (B-I, 20–21, 28.) Instead, Respondent showed a continuing lack of insight into the issues that brought NM into care in the first place. (B-II, 42–43, 59.) Moreover, Respondent had no concrete plan to deal with NM—who was becoming an adolescent—any differently than she dealt with JN, with whom she had engaged in physical altercations when they disagreed. (B-II, 57–62.)

Thus, the family court—which had already taken a proverbial leap of faith when it did not terminate Respondent's parental rights to NM in January 2012 and allowed for additional efforts at reunification—and NM would both be left to hope that Respondent *might* be able to prove that she could provide proper care for NM with even *less* supervision than she received in the past. It was not clear error for the family court to reject this recommendation. *In re Miller*, 433 Mich at 337.

3. Respondent's continuing inability to parent NM or provide an appropriate home, the lack of a parent-child relationship, and NM's need for permanence, stability, and finality outweighed any considerations of NM's age and wishes or the LGAL's recommendation.

The family court instead gave greater weight to other factors when it concluded by a preponderance of the evidence that termination of Respondent's parental rights was in NM's best interests. *In re Moss*, 301 Mich App at 90. [Appendix A.] For example, the evidence showed Respondent's lack of parenting ability. *In re Jones*, 286 Mich App at 129–130. *See also In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003) (holding that failure to comply with a PAA "is evidence of a parent's failure to provide proper care and custody for the child."). There was no indication that she could provide the structured environment that NM needed. (B-II, 8, 18, 24–25.) Importantly, Respondent did not even know NM, her own daughter, due to her voluntary decision to remain in Georgia. She described NM as someone who did not require much

discipline, a description that did not at all match reports from NM's foster mother and school that NM "argues a lot, is impulsive, [and has] difficulty following rules." (B-II, 40, 47–48, 55–58.) Respondent did not feel that NM would require much discipline, even though NM was becoming an adolescent. (B-II, 40–41.) Respondent made little to no effort to visit NM and appeared to believe that short phone conversations and Skype sessions were satisfactory. (B-II, 23, 27, 41.) In fact, she made *no verified visits* with NM after the court ordered her to have at least two face-to-face visits after July 2012. (R-III, 22; T, 10, 39, 45, 63.) When she had an opportunity to move to Michigan and have more visitation, she failed to follow through. (T, 13–15.) Dr. Park, who evaluated both NM and Respondent more than once over the course of the proceedings, did not believe that Respondent could properly parent NM. (B-II, 37–38, 41–42.) The foster care worker could not even verify the suitability of Respondent's home or income because she had no idea where Respondent lived due to a complete lack of communication. (B-II, 7, 18, 29, 31–32.) Again, the family court appropriately considered the evidence of Respondent's parenting ability or, more appropriately, inability.[24] [Appendix A, at 5–8, 10.] The court did not clearly err when it considered this evidence, either. *In re Miller*, 433 Mich at 337.

Likewise, the evidence showed that NM and Respondent no longer had a parent-child relationship. *In re BZ*, 264 Mich App at 301. Both Ms. Lambertsen and Dr. Park described them as more like peers, not a parent and child. (B-II, 8–9, 26–27, 42.) Respondent had been out of a parental role for "quite some time now." (B-II, 41.) She and NM only spoke "on average three

[24] The evidence at the best-interest hearing was in addition to the issues identified at the bench trial, such as Respondent's decision to end therapy without any authorization. (T, 9, 27, 48–49.) Respondent's lack of regular, verifiable visitation and her lack of verifiable income were also raised at the bench trial. (T, 10–13, 34–35, 37–39, 43–45, 63, 65, 70–71.) As noted previously, the family court is expected to have taken these facts into consideration given the nature of child protective proceedings, *In re King*, 186 Mich App at 465, and the court did in fact note in its Opinion and Order that it took judicial notice of the legal and social files, as well as the psychological evaluations. [Appendix A, at 3.]

times a week[,]" but NM was vague about the conversations. (B-II, 23, 27.) NM's caregiver reported that "[Respondent] always has something else going on or the conversations are cut very short." (B-II, 27.) Again, Respondent's descriptions of NM "[didn't] match with the foster mother's report [or NM's] school reports." (B-II, 40, 47–48, 55–58.) NM had been in care for about two and a half years. (B-II, 7, 17.) Respondent had not visited NM on any regular basis. (T, 10, 39, 45, 63.) The family court considered all of this evidence in its ruling. [Appendix A, at 5–8, 10.] The court did not clearly err when it did so. *In re Miller*, 433 Mich at 337.

Finally, as discussed above with regard to the LGAL's recommendation, the family court recognized and gave great weight to NM's need for permanence, stability, and finality, which Respondent simply could not provide. *In re Olive/Metts*, 297 Mich App at 42. NM would be afforded more stability, even if she continued in foster care, but only so long as Respondent could not continue to interpose herself and again raise NM's hopes of *possibly* returning to Respondent's care at some indefinite, unspecified time. *See In re AH*, 245 Mich App at 89. NM had been in care for two and a half years (B-II, 7, 17), yet there was no realistic prospect of permanence, stability, or finality as long as Respondent retained her parental rights. Ms. Lambertsen explained that she believed that the instability of not knowing when Respondent would be back in her life had negatively affected NM. (B-II, 8.) Terminating Respondent's parental rights allowed for the creation of a more permanent, stable, and final plan for NM. *In re Olive/Metts*, 297 Mich App at 42. As the family court recognized, any action short of termination "would be just another temporary solution for [NM] and would not give her the permanence that she desperately needs." [Appendix A, at 10.] The family court did not clearly err when it gave great weight to NM's need for permanence, stability, and finality and concluded that termination of Respondent's parental rights was in NM's best interests. *In re Miller*, 433 Mich at 337.

D. Conclusion

The family court's order terminating Respondent's parental rights was not clearly erroneous. Respondent lost her parental rights to three children, but she was given a renewed chance to provide a normal family home for NM. Instead of making the most of that opportunity, Respondent reverted to the same conduct and attitude that resulted in her parental rights to her other children being terminated. NM continued to languish in foster care, uncertain as to whether she might ever return to Respondent's care. The relationship between NM and Respondent was no longer that which should exist between a parent and child. NM requires permanence, stability, and finality, all of which are things that Respondent regrettably could not and cannot offer her. *See In re McIntyre*, 192 Mich App 47, 52–53; 480 NW2d 293 (1991) (finding that termination was in the children's best interests due to the lengthy period of the temporary wardship, the foster care worker's concerns, and the children's need for permanence).

Ultimately, the family court correctly concluded that NM's age, her desire to immediately return to Respondent's care in an unfit home, and the LGAL's recommendation that NM be allowed to continue lingering in foster care with only a dim hope of reunification, were substantially outweighed by other factors—especially NM's need for permanence, stability, and finality. The family court enjoys substantial deference to make this determination because, as this Court has held, the lower court was and is in the best position to judge witness credibility and weigh evidence. *In re Miller*, 433 Mich at 337; MCR 2.613(C). *See also In re Engle*, 480 Mich at 931. The family court's decision in this case was in accord with the purpose of Michigan's juvenile code: to protect NM from an unfit home. *In re Brock*, 442 Mich at 108, citing *In re Jacobs*, 433 Mich at 41. The decision to terminate Respondent's parental rights to NM was not clearly erroneous. *In re Sours*, 459 Mich at 633; *In re Miller*, 433 Mich at 337.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Joshua J. Miller, Assistant Prosecuting Attorney, on behalf of the Petitioner Department of Human Services, respectfully requests that this Honorable Court deny Respondent's application for leave to appeal or affirm the decisions of the family court and the Court of Appeals.

Respectfully submitted,

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